No. 96-1986

In The

Supreme Court of the United States

Supreme Court, U.S.
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October Term, 1996

SAMUEL L. NARO and LINDA NARO, husband and wife,

Petitioners,

vs.

HAMILTON TOWNSHIP, HAMILTON TOWNSHIP POLICE DEPARTMENT, DETECTIVE CAPTAIN THOMAS PIZZULLO, JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X (fictitious names meant to represent other police officers involved in the investigation), THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VIII, RON ROE IX, RON ROE X,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENTS THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE AND H.L. SCHWARTZ, III

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LIST OF PARTIES

The petition inaccurately lists John Does and Ron Roes, fictitious names, that were not identified and made parties at the trial level. Therefore, they are not parties to this proceeding. In addition, defendants Hamilton Township, Hamilton Township Police Department and Detective Captain Thomas Pizzullo are not parties to this proceedings.

The Trentonian is a trade name for a newspaper published by Capitol City Publishing Co., Inc., which is a wholly owned subsidiary of Journal Company, Inc., which is a wholly owned subsidiary of Journal Register Company, LLC. There are no nonwholly owned subsidiaries of respondent, *The Trentonian*.

There are no parent companies or subsidiaries of respondent Journal Register Company, which is now known as Journal Register Newspapers, Inc.

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CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law *** abridging the freedom of speech ***."

N.J.S.A. 2A:43-1 provides as follows:

> The privileged character attaching to the publication of judicial or other proceedings shall extend to the publication in any newspaper of official statements issued by police department heads and county prosecutors in investigations in progress or completed by them, and which are accepted in good faith by the publisher of any newspaper, and the privileged character thereof shall be a good defense to any action for libel, unless malice in fact be shown by the plaintiff therein.

STATEMENT OF THE CASE

As more fully set forth below, there is no cause for this Court's review of the decision of the New Jersey Superior Court Law Division as affirmed by the New Jersey Superior Court Appellate Division.

The petitioners' argument is that the two local newspapers in Trenton, New Jersey, *The Trentonian*[1] and *The Times*, should not have published statements made by police officials of

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1. *The Trentonian*, Journal Register Co., Mark A. Waligore, Paul Mickle and H.L. Schwartz, III are all referred to hereafter as *The Trentonian* respondents.

Hamilton Township, New Jersey that Mr. Naro was a suspect in a murder case.

Both the trial judge and the New Jersey Appellate Division found that the petitioners did not meet their burden of proof with respect to malice. The Appellate Division's decision also specifically adopted the Restatement (Second) of Torts § 611, at 297 (1977) that the reports of the media respondents in this case were protected by the fair report privilege.

The petitioners cannot dispute that the Chief of Police of Hamilton Township, New Jersey, Richard L. Taylor specifically stated that:

> Based on all the circumstances, the Hamilton Township Division of Police for a period of time considered Samuel Naro to be a suspect in the Marjorie Szeker murder.
>
> As the head of the Hamilton Township Division of Police, I told a reporter for *The Trentonian* that we considered Samuel Naro a suspect in the Marjorie Szeker murder.
>
> I made the statement as head of the Division of Police and it was an official statement. I expected that the reporter would utilize the information in articles that would be printed in *The Trentonian*.
>
> I have also reviewed the articles of *The Trentonian* published on October 24, 1990, October 25, 1990, October 26, 1990, October 27, 1990 and October 29, 1990 as well as articles of *The Trenton Times*

> published on October 24, 1990, October 25, 1990 and October 26, 1990 in preparing this Certification.
>
> I also advised Captain Pizzulo that he was authorized to communicate this official position to the news media, including *The Trenton Times* and *The Trentonian*.
>
> I was aware of the press coverage concerning Samuel Naro and the Szeker murder that appeared in both *The Trentonian* and *The Trenton Times* in October of 1990.
>
> At the time I originally read them and again upon reviewing them now, I feel that the articles set forth the official statements that I made or authorized to be made on my behalf as the head of Hamilton Township Division of Police concerning the issue. (Plaintiffs' Appendix New Jersey Superior Court Appellate Division 72a to 74a).

While it is true that the petitioners alleged that *The Trentonian* "falsely, libelously and maliciously wrote and published in its newspaper an article which stated that the Trenton suspect owned a van at the time of the Szeker murder and that the vehicle was seen fleeing the scene." (Pet. at 2), that allegation was inaccurate. The petitioners' statement that they alleged such an article was published on October 25, 1990 is also inaccurate. The petitioners' complaint made that allegation about a publication of October 26, 1990.

The October 26, 1990 article (Plaintiffs' Appendix New Jersey Appellate Division 69a) did not make such a statement. Rather it reported that:

> Hamilton Police, who were looking for a van that speed from the murder scene, report that Naro owns a van.

The Trentonian October 25, 1990 article (Plaintiffs' Appendix New Jersey Appellate Division 66a to 68a) merely reported information provided by the police which explained their reasons for wanting to interview Mr. Naro about the Szeker murder. In fact, *The Trentonian* reported the next day, October 26, 1990, that while the police were investigating the question of whether the van owned by Mr. Naro was involved in the Szeker murder that there were differences in the van owned by Mr. Naro and the van seen leaving the Szeker murder scene. (Plaintiffs' Appendix New Jersey Appellate Division 69a).

Petitioner Samuel Naro was arrested on October 23, 1990 on assault and related charges that he attacked Andrew Hrabchak on the porch of his house near the fire station where Naro worked. Naro was wearing a false mustache and dark sunglasses. His duffel bag found at the scene contained a wig and other disguises.

Mr. Naro's defense on the assault and related charges was based on a psychiatric defense, not that he did not commit the offenses.

The petitioners cite the deposition of Chief of Police Taylor (Pet. at 3). However, that deposition was not taken until after summary judgment had been granted to the media respondents and has not been part of the appellate record. *The Trentonian* respondents do not presently have a copy of that transcript and, therefore, cannot state whether the statements attributed to Chief Taylor are in fact correct. Judge Paley had Chief Taylor's certification which clearly and unequivocally stated that he had told *The Trentonian* reporter that Mr. Naro was in fact a suspect in the Szeker murder case. It should be noted that the certification

was a pleading containing the name of the law firm representing the Hamilton Township police defendants and is unequivocal that the Hamilton Township police, including Chief Taylor, considered Naro a suspect. The petitioners' contention (Pet. at 5) that *The Trentonian* labeled Mr. Naro a suspect in its October 25, 1990 article is another mischaracterization of the record. The headline stated that "Fireman to be quizzed in teacher slay." It does not state that he is a suspect. *The Trentonian* respondents also deny that six (6) of the seven (7) articles labeled Mr. Naro a suspect.

The statement in petitioners' petition at page 5 that "a later *Trentonian* article insinuated that plaintiff owned a van similar to the one seen at the murder scene," as shown above, misstates the article. It is further disputed that "no investigation was conducted by the police regarding plaintiff, except with regard to a van which he allegedly owned." It is undisputed that the Hamilton Township police, including Chief Taylor, labeled Naro a suspect. Obviously they conducted at least a mental examination of the facts surrounding the Hrabchak assault.

Petitioners reference to a subsequent article in *The Trentonian* concerning another suspect, Rivera, is clearly not relevant since it concerns information developed over eight (8) months after the police allegations concerning Mr. Naro.

The trial judge, Judge Philip L. Paley, in addition to relying upon *New Times v. Sullivan*, 376 U.S. 254 (1964) "and other authorities cited before me" also found:

> I am satisfied that the articles appear to be, and were at the time, true. The affidavit of Chief Taylor clearly reflects the fact that the police did consider Mr. Naro a suspect for a period of time. . . . But when Hamilton

> Township, through its police chief, caused the utterance of a public statement intended to be published, I cannot say that the newspapers should be obligated to continue their defense of this case when all the newspapers did was to repeat that statement.

REASONS FOR DENYING THE WRIT

The petitioners' argument that the Hamilton Township police should not have labeled Mr. Naro a suspect ignores the rulings of Judge Paley and the Superior Court of New Jersey Appellate Division and the undisputed facts of the case that in fact Mr. Naro was labeled a suspect in the Szeker murder case by the Hamilton Township police, including Chief Taylor. Since Mr. Naro in fact was a suspect, there were no false facts reported which is the threshold requirement for consideration of a libel action. *New York Times v. Sullivan, supra.*

Judge Philip L. Paley relied not only on *New York Times v. Sullivan, supra.*, but also "other authorities cited before me." Those other authorities included a New Jersey statute, N.J.S.A. 2A:43-1 that, independently of the First Amendment to the Constitution of the United States provides protection and in fact encourages newspapers to report issues of a public nature concerning the criminal justice system by providing a privilege to report official statements issued by police department heads. It is undisputed that Chief Taylor was the head of the Hamilton Township police when he told a reporter for *The Trentonian* that they considered Mr. Naro a suspect in the Szeker murder.

The protections afforded under New Jersey law are independent of those afforded by the First Amendment. *Cassidy v. Merin*, 244 N.J. Super. 466, 483 (App. Div. 1990). Even publishing a "careless and perhaps irresponsible account of the

information received concerning the scope of the City Attorney's investigation . . ." was " 'constitutionally insufficient' to present a jury question of actual malice." *Lawrence v. Bauer Publishing & Printing, Ltd.*, 89 N.J. 451, 468 (1982) (citing *New York Times supra*, 376 U.S. at 288).

Mr. Naro's bizarre behavior, including the assault of a seventy-eight (78) year old man, the Hamilton Township police considering him a suspect in a murder case and his status as a public employee, were certainly an appropriate basis for the Appellate Division to find that he was a limited purpose public figure. *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). However, the Appellate Division's decision further ruled that the reports in the newspaper of a true fact, that Mr. Naro was a suspect, "were protected by the fair report privilege." Restatement (Second) of Torts § 611, at 297 (1977) provides that:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.

Mr. Naro has settled with the Hamilton Township police alleging that they improperly labeled him a suspect. He cannot recover from media respondents for publishing the undisputed fact he was labeled a suspect by the Hamilton Township police. The media respondents were performing their obligation to report police allegations concerning a murder suspect.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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